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## Deconstructing and reconstructing Article 7 TFEU

Niamh Nic Shuibhne, University of Edinburgh

### I. Introduction

Article 7 TFEU states that '[t]he Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers'. Noting the reach of the other 'provisions having general application' that it frames, Article 7 is considered to speak to the Union in a broad and inclusive sense i.e. addressing its various institutions, bodies, offices and agencies.<sup>1</sup> But what does – or what should – it require these actors to do? After all, the range of policies, activities and objectives spread across the EU Treaties is now immense.

This chapter first traces the Treaty history of the three distinct parts now bound together in Article 7, demonstrating that the commitments to consistency, to taking all Union objectives into account, and to doing both in accordance with the principle of conferral have independent primary law origins. It will be seen that the obligation to ensure consistency between Union policies and activities is the most developed part of Article 7, which is not surprising having regard to its established function in the shaping and practice of EU competence in external relations. The commitments to taking all Union objectives into account and to respecting the conferral of powers could, in that light, be described as flanking responsibilities.

The chapter then asks if Article 7 generates a 'fourth element' i.e. does it contribute or require something, in terms of legal capacity or legal obligation, as the sum of its three parts? Here, it will be seen that the compound energy created by Article 7 seems to date to be pushing more in the direction of *expanding* the available space for Union activity – an outcome that is perhaps contrary to the impression created by looking at its three parts in isolation or by reflecting on the wider context of the Lisbon Treaty that introduced the provision in the first place. The terms of Article 7 are also linked to the current context of EU law making, coalescing around one basic query: is this provision just intended to express a set of nice ideas, or should it be engaged more substantively beyond that? In particular, in seeking to resolve freshly acute concerns about uniformity and differentiation in the Union's structure and functioning, it is suggested that Article 7 may yet have something more to contribute.

### II. Three parts: the Treaty path(s) to Article 7 TFEU

Article 7 TFEU – first drafted in this form for the Treaty establishing a Constitution for Europe<sup>2</sup> – collects together a set of principles with distinct Treaty origins. Tracking these different Treaty paths reveals characteristics that could still influence the current provision's impact, as well as highlight its limitations.

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<sup>1</sup> See e.g. CNK Franklin, 'The burgeoning principle of consistency in EU law' (2011) 30 *Yearbook of European Law* 42, 59; confirming that this includes the Court of Justice, see Thomas Horsley, 'Reflections on the role of the Court of Justice as the "motor" of European integration: legal limits to judicial lawmaking' (2013) 50 *Common Market Law Review* 931, 949-950.

<sup>2</sup> See Article III-115 of the adopted version (2004 OJ C310/1); like Article 7 TFEU, the provision was the first of those 'of general application' in Part III of this Treaty (i.e. covering 'the policies and functioning of the Union').

A. *‘to ensure consistency between its policies and activities’*

The obligation on the Union to ensure consistency between its policies and activities imparts Article 7 TFEU’s centre of gravity. That view aligns with the fact that consistency has the longest and most developed Treaty history of the provision’s three parts. What the introduction to this volume refers to as a *‘universal’* requirement of policy consistency<sup>3</sup> emerged over time from three inter-connected lineages: first, to manage the disjointed structure of the post-Maastricht Union; second, to establish a specific guiding objective in the field of external relations; and, third, to allocate institutional responsibility for oversight of these goals.

A Treaty-rooted role for consistency can be traced back to the Single European Act i.e. the first revision of the founding Treaty of Rome. At a general level, the preamble to the SEA conveyed:

... aware[ness] of the responsibility incumbent upon Europe to aim at speaking ever increasingly with one voice and *to act with consistency and solidarity* in order more effectively to protect its common interests and independence, in particular to display the principles of democracy and compliance with the law and with human rights to which they are attached, so that together they may make their own contribution to the preservation of international peace and security in accordance with the undertaking entered into by them within the framework of the United Nations Charter.

The outward-facing aspect of this objective was mapped onto the substantive reference to consistency in Article 30(5) of the Treaty, which stated that ‘[t]he external policies of the European Community and the policies agreed in European Political Co-operation<sup>3</sup> must be consistent’. That requirement was also addressed from an institutional angle, with the provision continuing that ‘[t]he Presidency and the Commission, each within its own sphere of competence, shall have special responsibility for ensuring that such consistency is sought and maintained’.

In the next stage of Treaty development, the Maastricht reforms fundamentally changed the very structure of the polity, as well as the nature, scope and functioning of its competence in external relations. These amendments in turn shaped an enhanced role for consistency in the altered EU system. On the first point, acknowledging the splintering of the European Economic Community’s unitary framework into three distinctive pillars, and picking up elements of the SEA’s preamble, Article A TEU provided that ‘[t]he Union shall be founded on the European Communities, supplemented by the policies and forms of cooperation established by this Treaty. Its task shall be to organise, *in a manner demonstrating consistency and solidarity*, relations between the Member States and their peoples’. Reflecting that idea and continuing with the allocation of specific institutional responsibility seen in Article 30(5), but progressing further the particularly important role of consistency in external relations, Article C then established:

The Union shall be served by *a single institutional framework which shall ensure the consistency and the continuity of the activities carried out* in order to attain its objectives while respecting and building upon the *acquis communautaire*. The Union shall *in particular ensure the consistency of its external activities as a whole in the*

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<sup>3</sup> The predecessor to the EU’s Common Foreign and Security Policy.

*context of external relations, security, economic and development policies. The Council and the Commission shall be responsible for ensuring such consistency. They shall ensure the implementation of these policies, each in accordance with its respective powers.*<sup>4</sup>

In that provision, we can see also early shades of the requirement to take the Union's objectives into account as well as indications of respect for the allocation (if not yet expressed in the language of conferral) of powers.

The Nice Treaty attached an objective of consistency to two further instances, responding again to the increased complexity of the Union's governance framework. First, while the Amsterdam Treaty had introduced provisions on enhanced cooperation, the post-Nice Article 27a TEU provided that the practice of it 'shall respect the principles, objectives, general guidelines and consistency of the common foreign and security policy and decisions taken within the framework of that policy'. More generally, Article 45 TEU confirmed the responsibility of the Council and Commission to 'ensure the consistency of activities undertaken on the basis of [enhanced cooperation] and the consistency of such activities with the policies of the Union and the Community, and shall cooperate to that end'. Second, Article 225 EC established the appellate jurisdiction of the (then) Court of First Instance vis-à-vis judicial panels and also provided in principle for that Court's jurisdiction to hear and determine questions referred for a preliminary ruling. However, a 'serious risk of the unity or consistency of Community law being affected' would enable exceptional review by the Court of Justice in both situations.

Bringing these steps together, and looking beyond Article 7 TFEU's 'universal' requirement, references to consistency are found across the current versions of the TEU and TFEU in five main contexts, all clearly traceable from the evolutionary path outlined above: (1) as one of the overarching tasks of the Union's institutional framework, remembering that while the Union's structure is formally 'de-pillared' following the coming into force of the Lisbon Treaty, some structural asymmetries remain operationally in place;<sup>5</sup> (2) conferring specific institutional and post-holder responsibilities;<sup>6</sup> (3) as an obligation within substantive policy

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<sup>4</sup> See further, Article J.8(2) TEU (on the role of the Council). The Amsterdam Treaty added that the Council and Commission 'shall cooperate to this end' in light of their shared responsibility for ensuring consistency. Article I-19(1) of the Treaty establishing a Constitution for Europe would have added ensuring of the 'consistency, effectiveness and continuity of [the Union's] policies and actions' as one of the tasks of its 'institutional framework'.

<sup>5</sup> See Article 13(1) TEU: 'The Union shall have an institutional framework which shall aim to promote its values, advance its objectives, serve its interests, those of its citizens and those of the Member States, and ensure the consistency, effectiveness and continuity of its policies and actions'. I am grateful to Panos Koutrakos for pointing out that there are also persisting *substantive* asymmetries, recalling Article 24(1) TEU's statement that '[t]he common foreign and security policy is subject to specific rules and procedures'.

<sup>6</sup> E.g. Article 16(6) TEU: 'The General Affairs Council shall ensure consistency in the work of the different Council configurations. It shall prepare and ensure the follow-up to meetings of the European Council, in liaison with the President of the European Council and the Commission. The Foreign Affairs Council shall elaborate the Union's external action on the basis of strategic guidelines laid down by the European Council and ensure that the Union's action is consistent'. See further, Articles 17(6) (the President of the Commission must ensure that that institution 'acts consistently, efficiently and as a collegiate body') and 18(4) TEU (the High Representative of the Union for Foreign Affairs and Security Policy 'shall ensure the consistency of the Union's external action').

areas, especially for policies that engage with the world beyond the Union;<sup>7</sup> (4) as a factor triggering exceptional appellate review within the Court of Justice of the European Union;<sup>8</sup> and (5) as a procedural tool for managing approved variation within the Union system or its procedures.<sup>9</sup>

However, while all of these instances tell us something about *why* consistency is resorted to as well as *who* needs to apply it – and that it is mainly styled as a functional or procedural *objective* in pursuit of *coordination* – few insights can be found on the question of *what* it actually entails or requires. The role of consistency within the appellate system of the Court of Justice of the European Union could offer a legally tangible instruction, but the degree or extent of the obligation of consistency that might actually trigger such an appeal is not yet obvious. At the time of writing, it has been successfully invoked in only three cases, all of which concerned the review of appeal decisions of the General Court in staff cases<sup>10</sup> – from which it is, by their very individual nature, difficult to draw more general or systemic insights.

### B. ‘taking all of its objectives into account’

Since its inception at Maastricht, the preamble to the TEU has observed that the signatories are ‘determined to promote economic and social progress for their peoples, *taking into account* the principle of sustainable development *and within the context of* the accomplishment of the internal market and of reinforced cohesion and environmental protection, and to implement policies ensuring that advances in economic integration are accompanied *by parallel progress in other fields*’. This recital reflects, though still at a relatively pared down level, the fact that the Union and its founding legal instruments pursue a range of different objectives at once – as any polity does. Additionally, the accompanying EC Treaty included a very specific requirement stipulating the taking of ‘cultural aspects into account in

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<sup>7</sup> See especially, Articles 21(3) (‘The Union shall ensure consistency between the different areas of its external action and between these and its other policies. The Council and the Commission, assisted by the High Representative of the Union for Foreign Affairs and Security Policy, shall ensure that consistency and shall cooperate to that effect’) and 26(2) TEU (‘The Council and the High Representative of the Union for Foreign Affairs and Security Policy shall ensure the unity, consistency and effectiveness of action by the Union’). See further, Article 121 TFEU (on coordination of the Member States’ economic policies, cross-referenced in Article 146 TFEU on Member State employment policies); Article 181(1) TFEU (‘The Union and the Member States shall coordinate their research and technological development activities so as to ensure that national policies and Union policy are mutually consistent’); Article 196(1) TFEU (‘Union action shall aim to: ... promote consistency in international civil-protection work’); Article 21(7) TFEU (‘The Union shall ensure that its humanitarian aid operations are coordinated and consistent with those of international organisations and bodies, in particular those forming part of the United Nations system’); and Article 42(7) TEU (requiring that ‘commitments and cooperation’ to aid and assist a Member State that is ‘the victim of armed aggression on its territory...shall be consistent with commitments under [NATO]’). We could also add Articles 52(3) (corresponding of Charter and ECHR rights) and 52(4) (interpretation of Charter rights ‘in harmony’ with the common constitutional traditions of the Member States) of the Charter of Fundamental Rights.

<sup>8</sup> See Article 256(2) TFEU, on exceptional jurisdiction up to and up from the General Court.

<sup>9</sup> See Article 329(2) TFEU on enhanced cooperation within the framework of the common foreign and security policy; see more generally, Article 334 TFEU (‘The Council and the Commission shall ensure the consistency of activities undertaken in the context of enhanced cooperation and the consistency of such activities with the policies of the Union, and shall cooperate to that end’).

<sup>10</sup> Case C-197/09 RX *Réexamen M v EMEA*, EU:C:2009:391; Case C-579/12 RX-II *Réexamen Commission v Strack* (11 December 2012); Case C-417/14 RX *Réexamen Missir Mamachi di Lusignano v Commission*, EU:C:2014:2219. For a negative decision, see Case C-141/18 RX *Réexamen FV v Council*, EU:C:2018:218.

[Community] action under other provisions of [the EC] Treaty' (Article 128(4) EC). These examples introduce two different types – general and particular – of what are now widely known as policy integration clauses. Both have since multiplied quite spectacularly.

Looking, first, at the more specific version, the SEA introduced the idea that '[e]nvironmental protection requirements shall be a component of the Community's other policies' (Article 130r(2) EEC); this was rephrased as 'must be integrated into the definition and implementation of other Community policies' at Maastricht. It was then relocated to the front of the Treaty at Amsterdam (to Article 6 EC, and later Article 3c). The Amsterdam Treaty further introduced (in Article 129a) the requirement that '[c]onsumer protection requirements shall be taken into account in defining and implementing other Community policies and activities'. Additionally, Article 3(2) EC provided that 'the Community shall aim to eliminate inequalities, and to promote equality, between men and women' in the carrying out of the activities listed in Article 3(1). Following the Lisbon Treaty, these and other policy integration instructions now constitute the 'provisions having general application' articulated in Articles 7-13 TFEU.

Second, however, more general expressions of the Union's objectives had also expanded with each Treaty amendment process. Comparing the Maastricht and Lisbon iterations of what began life as Article 2 EC demonstrates this point:

*Article 2 EC (Maastricht)*

The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing the common policies or activities referred to in Articles 3 and 3a, to promote throughout the Community a harmonious and balanced development of economic activities, sustainable and non-inflationary growth respecting the environment, a high degree of convergence of economic performance, a high level of employment and of social protection, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.'

*Article 3(3) TEU (Lisbon)*

The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance. It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child. It shall promote economic, social and territorial cohesion, and solidarity among Member States. It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced.

It can be noticed that many of these objectives are then reiterated in the more specific policy integration clauses of the TFEU.

Looking across these amendments, from Maastricht to Lisbon, three main points can be observed: first, the incremental expansion of policy integration objectives; second, the gradual positioning of these requirements at the beginning of the Treaty texts, communicating the sense that these interests should frame Union activity more generally as well as more

prominently; however, third, the non-prioritised or horizontal nature of any relationship between them.

In other words, while Article 7 TFEU asks that *all* Union objectives should be taken into account, the Treaties do not provide explicit guidance about how this could actually be achieved in practice. No clue is offered either about the intended significance – or not – of the objectives further singled out as having ‘general application’ in the provisions immediately following Article 7. These points are returned to in Section III.B below.

### *C. ‘in accordance with the principle of conferral of powers’*

The Maastricht-generated Article 3b EC stated that ‘[t]he Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein’. The core standards of subsidiarity and proportionality were also expressed in this provision. These obligations have been developed considerably over the intervening years and are now spread primarily across Articles 3(6),<sup>11</sup> 4,<sup>12</sup> and 5 TEU;<sup>13</sup> and complemented by the express delineation of Union competences in Articles 3-6 TFEU as well as by Protocols on the application of the principles of subsidiarity and proportionality, and on the role of national parliaments. As a provision rooted in that environment, Article 7 TFEU seems to provide another reminder of the limits imposed on Union action through its reference to the principle of conferral of powers – limits that the drafters felt compelled to restate but also to enhance and elaborate through each process of Treaty amendment and certainly for the Lisbon Treaty, as outlined in more detail in Section III.C below.

However, Article 7 does not necessarily produce the expected ‘back off’ signal that a conferral reminder might reasonably be expected to manifest, an observation also returned to in Section III.C below.

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<sup>11</sup> ‘The Union shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties’.

<sup>12</sup> ‘1. In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States. 2. The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State. 3. Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives’.

<sup>13</sup> ‘1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality. 2. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States. 3. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level. ... 4. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties’.

### III. The nature and capacity of Article 7: three questions

Knowing more about how each of Article 7 TFEU's three parts originated does not reveal much about what kind of provision it was intended to be, or what kind of contribution it might reasonably be expected to make to realising the Union's policies, activities and objectives. In this Section, three crosscutting questions are examined with the aim of shedding further light on the nature and capacity of the provision, examining in turn: first, its legal character; second, how the multiplicity of Union activities, policies and objectives was intended to be managed, including whether any sense of hierarchy among them can be discerned from within the Treaties; and, third, whether the sum of the three parts of Article 7 TFEU in fact creates a substantive 'fourth' responsibility or obligation.

#### A. Legal character

It was noted in Section II that consistency is the most developed element of Article 7 TFEU, owing to its embedded role in EU external relations in particular.<sup>14</sup> Nevertheless, even in that field, there is an unresolved definitional question about whether the English language references to 'consistency' in the Treaties mirror the meaning of *cohérence* used in French – a difference in terminology also found in other language versions. Underpinning this discussion in EU external relations law is a view that consistency is essentially a static objective whereas coherence – which includes but is broader than consistency – conveys a more active or dynamic responsibility.<sup>15</sup>

The coherence/consistency distinction seems to raise questions about the extent and nature rather than existence of consistency-related obligations (the term used throughout this chapter in order to align with the English version of Article 7 TFEU). For example, Berteau considers coherence as a criterion of the rule of law, pointing out that 'coherence should be considered a fundamental...value in every legal system, for it relates to the idea that the system has to make sense as a whole. And making sense as a whole is a precondition of intelligibility, which in turn is a requirement essential to law'.<sup>16</sup> Nevertheless, there is broad agreement that even the more narrowly drawn concept of consistency has evolved beyond a mere guideline or abstract objective even if perceptions of the intensity of resulting obligations and of whether or not it qualifies as a general principle of Union law still vary.<sup>17</sup>

<sup>14</sup> See generally, Marise Cremona, 'Coherence in foreign policy – the legal dimension' in Panos Koutrakos (ed.), *European Foreign Policy: Legal and Political Perspectives* (Edward Elgar 2011) 55; Christophe Hillion, 'Tous pour un, un pour tous! Coherence in the external relations of the European Union' in Marise Cremona (ed.), *Developments in EU External Relations Law* (OUP 2008) 10.

<sup>15</sup> E.g. the French Treaty text provides: 'L'Union veille à la cohérence entre ses différentes politiques et actions, en tenant compte de l'ensemble de ses objectifs et en se conformant au principe d'attribution des compétences'. Discussing the implications of the distinction, see Christian Tietje, 'The concept of coherence in the Treaty on European Union and the Common Foreign and Security Policy' (1997) 2 *European Foreign Affairs Review* 211, 212-213; Leonhard den Hertog and Simon Stroß, 'Coherence in EU external relations: concepts and legal rooting of an ambiguous term' (2013) 18 *European Foreign Affairs Review* 373, 375-377; Marise Cremona, 'Coherence through law: what difference will the Treaty of Lisbon make?' (2008) 3 *Hamburg Review of Social Sciences* 11, 13-14; Ester Herlin-Karnell and Theodore Konstadinides, 'The rise and expectations of consistency in EU law: legal and strategic implications for European integration' (2013) 15 *Cambridge Yearbook of European Legal Studies* 139, 141-143.

<sup>16</sup> Stefano Berteau, 'Looking for coherence within the European Community' (2005) 11 *European Law Journal* 154, 170.

<sup>17</sup> E.g. 'the nature and different dimensions of coherence as a principle are still difficult to pin down' (Cremona, n15, 13); 'a free-standing formal legal imperative which governs the EU legal integration



Classification as a general principle of Union law is especially important from the perspective of attaching to Article 7 both capacity for review of its application and the nature of the consequences that can be drawn through that process. Reflecting the definition of general principles applied by Tridimas – i.e. ‘fundamental propositions of law which underlie a legal system and from which concrete rules or outcomes may be derived’<sup>18</sup> – and drawing from Court of Justice case law that constructed EU standards of judicial protection, many commentators expressly characterise the judicially conceived obligation of consistency as a general principle of EU law.<sup>19</sup> In the field of external relations law pre-Lisbon, the decision in *ECOWAS* is typically pointed to as the classic exposition of the Court’s understanding of and approach to consistency.<sup>20</sup> Aspects of this case law are returned to in Section IV below. But critique of the *ECOWAS* judgment should also be acknowledged here, since it projects caution about how we might apply consistency as a legally consequential principle in an attempt to evaluate policy decisions.<sup>21</sup> At a descriptive level, however, we can note that the evolution of consistency as a general principle reflects three different phases: initial development as part of the construction of EU constitutional governance; then somewhat narrowed by early Treaty expressions that linked consistency to specific fields or policies as well as serving more specific tasks and functions; but then broadened outwards again – re-generalised, in a sense – through Article 7 TFEU and the Lisbon Treaty.

If consistency does qualify as a general principle of EU law, then it is important to consider not just how it can or should be applied; but also, as noted above, to examine how its application can be reviewed and what consequences might flow from assessments made in that respect. Before the adoption of the Lisbon Treaty, these questions had been discussed in terms of the extent to which the different elements now joined together in Article 7 TFEU were justiciable.<sup>22</sup> For example, addressing the extent of a ‘taking into account’ obligation, Jans observed that judicial review of compliance with the environmental policy integration clause had been ‘limited to the question of whether the Union legislator committed “a manifest error of appraisal”’, having regard to the fact that ‘the Union’s institutions have wide discretionary powers as to how they shape their environmental policy’.<sup>23</sup> That approach could logically be mapped onto judicial evaluations undertaken on the basis of Article 7 more generally.

But for now, we do not know – since the Lisbon Treaty took effect and up to the time of writing, Article 7 TFEU has not yet been engaged with in a judgment of the Court of Justice. However, in line with the cautious future anticipated by Jans, Franklin offers a compatible premonition by recalling the Court’s largely hands-off approach to the scrutiny of institutional choices made on the basis of subsidiarity, just two Treaty steps away in Article 5 TFEU.<sup>24</sup> It is similarly well established that judicial review of the proportionality of EU legislation is considerably

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process’ (Herlin-Karnell and Konstadinides, n15, 140); ‘the notion of coherence is one of the main constitutional values of the EU’ (Tietje, n15, 211).

<sup>18</sup> Takis Tridimas, *General Principles of EU Law*, 2nd ed. (OUP 2007) 1.

<sup>19</sup> E.g. Franklin, n1, 52 and Tietje, n15, 214; referring to e.g. Case 314/85 *Foto-Frost*, EU:C:1987:452, Case C-221/88 *Busseni*, EU:C:1990:84, and Case C-143/88 *Zuckerfabrik*, EU:C:1991:65. Herlin-Karnell and Konstadinides emphasise a particular role for consistency as a general principle in the context of issues beyond the reach of the TFEU, such as Treaty opt-outs (n15, 158-161 and 165).

<sup>20</sup> Case C-91/05 *Commission v Council (ECOWAS)*, EU:C:2008:288.

<sup>21</sup> E.g. Panos Koutrakos, ‘EU law: external relations’ (2010) 59 *International and Comparative Law Quarterly* 481, 483-484.

<sup>22</sup> E.g. on consistency, see Franklin, n1, 60.

<sup>23</sup> Jan Jans, ‘Stop the integration principle?’ (2011) 33 *Fordham International Law Journal* 1533, 1543; referring to Case C-341/95 *Bettati*, EU:C:1998:353.

<sup>24</sup> Franklin, n1 above, 84-85

more temperate than review of national measures undertaken on the same premise. All of this would suggest that only the most blatant failures of responsibility under the Article 7 criteria could derail an EU measure.

Nevertheless, judicial review materialises both exceptionally and at the end of a much bigger process. Conceiving of Article 7 as a positive and substantive coordinate of the wider EU law-making matrix, there remains general agreement that its terms should be understood as operating not just to *inspire* but also to *deliver* harmonious policy outcomes. For example, discussing the role of consistency in the context of legal drafting, Herlin-Karnell and Konstadinides suggest that this would entail ‘not only...consistency of content (i.e. coordination and avoidance of contradiction) but also...consistency of logic (consolidation) and goals’<sup>25</sup> – an ambition underscored when Article 7’s requirement also to take different objectives into account is recalled.

Thinking then about how such goals could be realised in practice, Cremona develops a useful typology based on three ‘levels of analysis’ for consistency, which in turn suggest its key functions. Her approach involves rules of hierarchy; rules of delimitation, which link also to Article 7’s third part (respect for the conferral of powers); and principles of ‘cooperation and complementarity’.<sup>26</sup> However, she acknowledges that there can be operational tensions between these different levels; as well as potential complications caused by the conferring of responsibility on a range of different institutional actors: ‘[n]ot only will there be a number of different actors to coordinate, a number of different actors will have responsibility for that coordination’.<sup>27</sup> In other words, there is no one consistency ‘controller’ prior to the endgame of judicial review through litigation in the Court of Justice – an event itself unlikely to lead to intensive scrutiny of policy decisions in any event, for the reasons noted above.

Den Hertog and Stroß propose a fourth category to add to Cremona’s framework i.e. ‘rules of substantive guidance’, which concern the actual content of policies.<sup>28</sup> Leaning more into the active demands of coherence than the passive construct of consistency, to recall the distinction applied in EU external relations scholarship, they specifically identify a function of *stimulation* for rules of substantive guidance as a function of coherent policy-making: i.e. ‘not “merely” imply[ing] a negative connotation of *absence of* contradiction but would, ideally, require a substantive (re)orientation of policies around common principles and objectives’.<sup>29</sup> Den Hertog and Stroß constitute these rules at a general level by reference to Articles 2 and 3 TEU. From a normative perspective, they suggest that the values articulated in that part of the Treaty ‘should inform policy-makers about the outer boundaries of policy formulation and implementation’, since ‘even if actors cooperate sincerely and respect the limits of their proper competences this does not automatically result in coherent policy outcomes’.<sup>30</sup> Berteau’s observation that ‘what is coherent forms a rational unit rather than a chaotic assemblage of possibly inconsistent normative statements’ resonates here too;<sup>31</sup> though it should be remembered that chaos can stem from ‘contradictions *and* overlapping’.<sup>32</sup> Thus while the idea of using Articles 2 and 3 TEU to cut through ambiguity regarding the values that should guide Union action, the problem is that those provisions themselves express

<sup>25</sup> Herlin-Karnell and Konstadinides, n15, 146.

<sup>26</sup> Cremona, n15, 14-16.

<sup>27</sup> Ibid 34.

<sup>28</sup> Den Hertog and Stroß, n15, 379-383.

<sup>29</sup> Ibid 381 (emphasis in original).

<sup>30</sup> Den Hertog and Stroß, n15, 379.

<sup>31</sup> Berteau, n16, 170.

<sup>32</sup> Franklin, n1, 43 (emphasis added).

attachment to so many values as to render any formal sense of instruction that they could provide ultimately futile. That point leads then to the more biting prospect of hierarchy.

### *B. Questions of hierarchy*

Further refining the functional character of consistency, commentators tend to separate out its horizontal (i.e. 'inter-policy and inter-pillar coherence') and vertical (i.e. 'the relationship between Member State and Union action') application.<sup>33</sup> The broader Treaty scheme outlined in Section II above entails this distinction too, with vertical consistency 'reflected in the notions of loyalty and primacy' and horizontal consistency invoking 'the broader principles of good administration and good governance related to openness, transparency and accountability to democratic institutions'.<sup>34</sup> The former point is reinforced within Article 7 itself, through the reference to conferral of powers. Looking across all three parts of the provision more holistically, Cremona suggests that horizontal consistency places 'emphasis...on policy coordination, complementarity and even integration, rather than hierarchy' and she points out that this understanding fits well with the policy integration clauses that follow on from Article 7.<sup>35</sup>

But it is also arguable that a scheme or system of hierarchy is sometimes necessary to facilitate the making of decisions that are both defensible and effective, providing an interesting point of tension with the ethos of horizontally driven policy integration that is clearly captured by Article 7's appeal to take *all* Union objectives into account.

The particular dimension of the problem for present purposes is the incremental multiplication of Treaty objectives that need to be taken into account combined with the absence of detailed guidance on how to negotiate through the resulting range of interests committed to in parallel – especially when it is remembered that values pursued under different headings can conflict with each other in reality.<sup>36</sup> The upshot of the Lisbon-intensified proliferation of principles that this project aims to investigate is therefore that 'everything has to be taken into account with everything!'<sup>37</sup>

Relatedly, and connecting to Section III.A's questions about justiciability, Jans states that owing to the coming into force of the Lisbon Treaty, '[t]he already difficult task of the European legislator to balance sometimes conflicting interests has become even more complex' and argues that the Court of Justice might in consequence 'show even more deference to the EU's political institutions than before...and become even more reluctant to reach the conclusion that the European legislator committed a "manifest error of appraisal"'.<sup>38</sup> Moreover, joining that conclusion to the principle of conferral, he further asserts that '[t]he requirement to balance multiple objectives, according to the multiplicity of

<sup>33</sup> E.g. Cremona, n15, 19 and 16 respectively. See further, Den Hertog and Stroß, n15, 377-378.

<sup>34</sup> Herlin-Karnell and Konstadinides, n15, 142.

<sup>35</sup> Cremona, n15, 19; as one of her three levels of analysis, she frames consistency in this sense as 'encompassing rules for conflict avoidance between potentially conflicting norms and for resolving conflicts when they arise' (ibid 14).

<sup>36</sup> E.g. even focusing on the comparatively narrower task of environmental policy integration, Jans remarks that 'the manner in which potential and actual conflicts between protection of the environment and, for example, how the functioning of the internal market should be resolved cannot be inferred from the integration principle as such' (Jans, n23, 1542).

<sup>37</sup> Ibid 1545.

<sup>38</sup> Ibid 1545, drawing an analogy with judicial review in the area of the common agricultural policy as demonstrating 'the reluctance of the Court to intervene in matters where the Union legislator has to weigh various objectives against each other'.

integration principles, makes it more difficult to draw a clear line between Union and Member State competences. The blurrier the objectives become, the blurrier the division of powers between the Union and Member States'.<sup>39</sup>

It is useful in that light to look not only at the policy integration clauses that follow on from Article 7, but also at the provisions that precede it. Here, similarly, we see further evidence of a Treaty that seeks to achieve everything at once while, at the same time, suggesting little reflection on how different commitments might end up in tension with each other. Article 4 TEU provides a good example for present purposes, noting that respect for the national identity of the Member States and the principle of sincere cooperation between the Union and the Member States are simultaneously articulated: which objective should yield where they tend towards different outcomes in a concrete situation? A related hierarchy – or better, absence of hierarchy – problem is noted by Jans where, addressing environmental policy integration specifically, he cautions:

[D]ecision-making on the basis of multiple integration principles could result in measures where the component elements are still visible, but not as sharply and clearly as before. There is, therefore, an inherent danger that under the disguise of integration, certain environmental standards will be diluted or offset against other interests and policy considerations. As an ultimate consequence, it might result in what could be called “reversed integration,” a process by which certain environmental standards, such as environmental quality standards or emission standards, are lowered as a consequence of the requirement that other than environmental interests are to be taken into account.<sup>40</sup>

However, Franklin is less concerned about the likely impact of this danger in reality, emphasising that '[c]ertain objectives may naturally be considered in policymaking activities only to be subsequently left out in the actual policy formulation that takes place, without thereby falling foul of [Article 7] requirements'.<sup>41</sup> Seen in that perspective, we are perhaps reminded once again of the limited role and capacity of a legal principle within the complexities of the policymaking process.

There is therefore much appeal in Cremona's presentation of consistency as something in between; as 'provid[ing] a context and rationale for the operation of fundamental legal principles governing the relations between Member States and the EU institutions and between the institutions themselves, including the principle of primacy [and] the duty of cooperation'.<sup>42</sup> Applying that idea to Article 7 more generally, it could then be conceived of and applied not just as a locus of ideals bundled symbolically together but rather, and alongside the other provisions of general application, as containing tools that are needed to navigate between the Treaties' bundled ideals more generally.

However, while that understanding of Article 7 works well for thinking about the premises of consistency and conferred powers in particular, it remains less obviously useful for finding a way through the well-meaning but impractical commitment to taking all Union objectives into account as part of the wider task encoded in the provision.

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<sup>39</sup> Ibid 1546.

<sup>40</sup> Jans, n23, 1547.

<sup>41</sup> Franklin, n1, 67.

<sup>42</sup> Cremona, n15, 13.

### C. A fourth part?

As the sum of its parts, then, one view is that Article 7 can administer little more than a good governance reminder, reaffirming an administrative or process-based priority that resonates with, for example, the ‘fair balance’ logic applied in EU legal reasoning where several relevant interests fall to be reconciled.<sup>43</sup> But Franklin considers that since consistency is now ‘made contingent upon two separate matters’ in Article 7 TFEU, the provision in fact ‘represents a...new legal reality to which the EU institutions and Member States will have to adjust’.<sup>44</sup> It is therefore worth examining in more detail whether the three parts of Article 7 fuse together to generate something autonomous, a ‘fourth part’ that somehow reflects or even defines the ‘new legal reality’.

Turning from questions connected to the horizontal understanding of consistency to the often more fraught context of vertical governance relations, Herlin-Karnell and Konstadinides identify the ‘promoting [of] clearer competence delimitation and conflict prevention/resolution between the EU and the Member States’ legal orders’ as a characteristic of the Lisbon emanation of consistency in particular.<sup>45</sup> This point is set within a more general argument about integration and uniformity, based in essence on the idea that ‘consistency has over time become an anchoring point for extending EU law competences’.<sup>46</sup> Leaving the specific question of uniformity to the side, for now, the perspective outlined by Herlin-Karnell and Konstadinides depicts consistency as going beyond a desire to make laws and policies fit together; acting (also) as a funnel that pulls competence towards Union level.

At first sight, it would seem that Article 7 would act as an antidote to precisely that kind of funnelling effect. As Cremona observes, ‘the Treaty of Lisbon responds to the challenge of vertical coherence, not by giving more power to the Union but by emphasising the boundaries to Union power, the concurrent powers of the Member States and their role in furthering Union policy’.<sup>47</sup> Similarly, Franklin describes how EU policy-making choices can be ‘inhibited’ by the principle of conferred powers.<sup>48</sup> It is obvious, after all, that the messages permeating several aspects of the Lisbon Treaty connect very explicitly to articulating and protecting the division of powers between the Union and the Member States: to the principle of conferral, exemplified through express classification and delimitation of Union and Member State competences;<sup>49</sup> to the principle of subsidiarity, with a novel function for national parliaments in the EU law-making process;<sup>50</sup> to principles of and mechanisms for explaining and enhancing the role of both participatory and representative democracy in the composite Union system;<sup>51</sup> and to protecting fundamental rights as a priority of the EU legal order.<sup>52</sup> A unifying theme across these innovations evokes the objective of decentralisation, a (re-)prioritising of the

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<sup>43</sup> E.g. Case C-283/11 *Sky Österreich*, EU:C:2013:28, para. 60 (‘[w]here several rights and fundamental freedoms protected by the European Union legal order are at issue, the assessment of the possible disproportionate nature of a provision of European Union law must be carried out with a view to reconciling the requirements of the protection of those different rights and freedoms and a fair balance between them’).

<sup>44</sup> Franklin, n1, 61.

<sup>45</sup> Herlin-Karnell and Konstadinides, n15, 140.

<sup>46</sup> *Ibid* 143.

<sup>47</sup> Cremona, n15, 29.

<sup>48</sup> Franklin, n1, 56.

<sup>49</sup> Esp. Article 4 TEU and Articles 2-6 TFEU.

<sup>50</sup> Esp. Article 5(3) TEU, Protocol on the Role of National Parliaments in the European Union, and Protocol on the Application of the Principles of Subsidiarity and Proportionality.

<sup>51</sup> Esp. Article 10 TEU.

<sup>52</sup> Esp. Articles 2 and 6 TEU.

authority and force of the *national* as an integral (and perhaps even superior?) actor in the composite system and structures of EU governance.

Interestingly, however, these expectations do not seem to be holding up in what little Article 7 practice we can look at to date. The particular lineage of the consistency obligation vis-à-vis EU external relations leaves a stubborn imprint here, especially noting the added impact of the principle of sincere cooperation in Article 4(1) TEU. In particular, the inherited starting point of 'loyalty has a "pre-emptive" effect upon the behaviour of Member States in that it pre-empts them from undertaking any action that could potentially undermine the objectives of the treaties'.<sup>53</sup> The resulting 'blocking effect of EU law' is well demonstrated by Tridimas in his analysis of judgments of the Court of Justice that develop its approach to international law. Overall, he concludes that 'in the field of external competence, oddly the presumption lies with exclusive rather than shared competence' and this 'reversing, in effect, the rule of priority of Article 4(2) TFEU'.<sup>54</sup>

For example, in *Commission v Luxembourg*, which Tridimas characterises as reflecting a more 'intrusive' version of consistency than the traditional *ERTA* paradigm,<sup>55</sup> the Court ruled:

The adoption of a decision authorising the Commission to negotiate a multilateral agreement on behalf of the Community marks the start of a concerted Community action at international level and requires, for that purpose, if not a duty of abstention on the part of the Member States, at the very least a duty of close cooperation between the latter and the Community institutions in order to facilitate the achievement of the Community tasks and to ensure the coherence and consistency of the action and its international representation.<sup>56</sup>

It is not clear what recourse to coherence and consistency adds here beyond longstanding case law on the duty of cooperation as affirming 'the requirement of unity in the international representation of the Community'.<sup>57</sup> Moreover, Cremona points out that, in this case, while 'the Member States' duty of cooperation is [expressly framed] in terms of coherence and consistency of EU external action [it] is cast in procedural terms...affecting how the Member State's competence is exercised, and is to be distinguished from both exclusivity and pre-emption, where the Member State is prevented from acting at all'.<sup>58</sup> However, while she argues that 'the distinction is important', she also concedes that 'the line can be a thin one'.

It is important to note that the decision in *Commission v Luxembourg* was delivered pre-Lisbon. However, it is the atmosphere that the Court's approach generates that may prove to be significant in trying to understand what the implications of Article 7 as a *compound* objective might be. If the scaffolding around that provision is drawn mainly from the requirements of

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<sup>53</sup> Herlin-Karnell and Konstadinides, n15, 151.

<sup>54</sup> Takis Tridimas, 'Competence after Lisbon: the elusive search for bright lines' in Diamond Ashiagbor, Nicola Countouris and Ioannis Lianos (eds.), *Legal Issues of the Lisbon Treaty* (CUP 2012) 47, 63.

<sup>55</sup> Ibid 62.

<sup>56</sup> Case C-266/03 *Commission v Luxembourg*, EU:C:2005:341, para. 60. See also e.g. Case C-246/07 *Commission v Sweden*, EU:C:2010:203 and Case C-263/14 *Parliament v Council*, EU:C:2016:435. See further, Den Hertog and Stroß, n15, at 378 and 388. The seeds of this analysis can also be seen in Tietje, n15, 230-231. Moreover, recalling the discussion on terminology in Section III.A, Hillion has argued that the Court's use of *both* consistency and coherence here mitigates against the concepts having the same meaning (n14, 13).

<sup>57</sup> E.g. Opinion 1/94, EU:C:1994:384, para. 108; Opinion 2/91, EU:C:1993:106, para. 36.

<sup>58</sup> Cremona, n14, 72.

primacy and sincere cooperation, and flavoured strongly by the continuing legacy of EU external relations law, then Article 7 does indeed support a bias in favour of EU competence – the ‘blocking effect’ identified by Tridimas. If that proves correct, then it arguably transcends the message of Article 7’s individual parts and of the wider Lisbon Treaty context too, demonstrating once again that what is written into the Treaties proves ultimately less definitive than how it is subsequently interpreted.

However, it is not the Court of Justice that should attract particular criticism in this respect. Rather, when political actors design and/or agree to a Treaty text that embeds all kinds of policies, activities and objectives in an ostensibly horizontal manner, that in itself creates the necessary space for their selective balancing and blending in due course.

#### IV. Article 7 and the evolving Union

It was seen in Section II that before the generalisation of consistency through Article 7 TFEU, the principle was understood and applied to ensure that the Union’s legal order would function across different rules and structures, especially in the specific domain of the CFSP and external relations. In those policy fields, the challenge now is to relocate consistency in a legal context where measures still adopted under different sets of rules are, post-Lisbon, governed by a single set of objectives.<sup>59</sup> This partial legal fusion may make the functioning of the legal order even more difficult to monitor in practice. Beyond that specific – still special – policy domain, and with several years now passed since Article 7 acquired legal effect, it remains the case that the provision has made hardly any detectible legal imprint.<sup>60</sup>

Could the provision be somehow invigorated to play a more visible role in the current context of Union governance questions, drawing from its legacy in external relations law as a prescription for creating order across the potential chaos of disparity and diversity? Consider, for example, the following extract from Herlin-Karnell and Konstadinides, which picks up on the role of consistency in the sphere of enhanced cooperation:

[C]onsistency manifests itself within the area of enhanced cooperation as a means of aligning diversity with the wider policies of the EU. However, differentiation also includes a number of modalities which do not expressly require consistency in order to operate. For instance, there is no reference to consistency in the relevant treaty provisions regulating the so-called ‘opt-outs’. This is despite the dangers that such ‘differentiation’ carries for European integration from the perspective of uniformity.<sup>61</sup>

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<sup>59</sup> See here, Article 21 TEU.

<sup>60</sup> Or any kind of imprint; one of the few references to Article 7 TFEU more generally is in the European Parliament’s Committee on Legal Affairs 2011 Report on guaranteeing independent impact assessments (A7-0159/2011; available at [http://ec.europa.eu/smart-regulation/refit/admin\\_burden/docs/111020\\_niebler\\_report\\_en.pdf](http://ec.europa.eu/smart-regulation/refit/admin_burden/docs/111020_niebler_report_en.pdf)); see para. 15 (‘Calls for impact assessments to not focus exclusively on cost/benefit-analysis but to take a large number of criteria into account, in accordance with the principle of an integrated approach, in order to provide the legislator with as comprehensive a picture as possible; draws attention in this context to the economic, social and environmental aspects referred to in the interinstitutional agreement of 16 December 2003 and the common approach of 2005, which are to be combined in a single evaluation; underlines, in this respect, the need to ensure consistency between policies and activities of the EU by taking all of its objectives into account and in accordance with the principle of conferral of powers as laid down in Article 7 TFEU’).

<sup>61</sup> Herlin-Karnell and Konstadinides, n15, 140.

Later, they explain their perspective on the synergy between consistency and uniformity in more detail, observing that, in pursuit of European integration through case law in particular, ‘the notions of effectiveness and uniformity formed part of the broader constitutional understanding of consistency in EU law’.<sup>62</sup>

We can find precisely this linkage in Opinion 2/13 on accession by the EU to the ECHR. Here, as part of its potent presentation of ‘the specific characteristics and the autonomy of [the EU] legal order’, the Court of Justice stated that ‘the Treaties have established a judicial system intended to ensure *consistency and uniformity* in the interpretation of EU law’.<sup>63</sup> It expanded on that point through the context of the preliminary ruling procedure, the object of which is to ‘secur[e] uniform interpretation of EU law...thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties’.<sup>64</sup> On one view, the reasoning applied in Opinion 2/13 is simply a natural evolution of the idea of systemic coherence enunciated in classic judgments such as *ERTA*.<sup>65</sup> Examining that decision through a coherence lens, Berteau, for example, notes that ‘the correct interpretation of Community norms is dictated by global coherence considerations: the Court of Justice is asking us to interpret certain norms as not to undermine the system’s overall coherence...The idea of coherence is thereby understood as a device for uniformly developing a system of laws’.<sup>66</sup> The collapsing together of coherence and uniformity fits well also with the funnelling effect that can be attributed to Article 7, discussed above.

However, the consistency/uniformity linkage arguably raises a different order of challenge at the present time. This is because the varieties and versions of differentiation operating – legitimately – as part of the persistently complex structure of the Union reflect a reality where differentiation is more explicitly an inherent than exceptional feature of integration; a manifestation of rather than risk to integration. If differentiation is accepted as an inherent and enduring feature of integration, it might indeed be necessary to ring-fence at least some hard manifestations of consistency in tandem with uniformity – such as, for example, the core Union value of equal treatment – from a still legally demanding but potentially softer understanding of ‘Article 7 consistency’, the latter constituting a less rigid principle of governance that would frame but not funnel more disparate and diverse EU rules and structures. It is not the overlap but the *differences* between consistency and uniformity that should, in other words, be animated.

The fact that the February 2016 Decision, addressing the relationship between the EU and the United Kingdom before the latter’s June 2016 Brexit referendum, committed to Treaty recognition of distinctions between Member States whose currency is and is not the euro (as part of the ‘new settlement’ for the UK) provides an interesting example of where Article 7’s obligations would have needed to feature.<sup>67</sup> In particular, in Section A (‘Economic Governance’), and having noted that not all Member States participate ‘in the further deepening of the economic and monetary union’, it was stated that ‘[t]he Union institutions, together with the Member States, will facilitate the coexistence between different perspectives within the single institutional framework *ensuring consistency*, the effective operability of Union mechanisms and the equality of Member States before the Treaties, as

<sup>62</sup> Ibid 143; see also, 148.

<sup>63</sup> Opinion 2/13, EU:C:2014:2454, para. 174 (emphasis added).

<sup>64</sup> Ibid para. 176, referring to Opinion 1/09, EU:C:2011:123, paras 67 and 83.

<sup>65</sup> Case 22/70 *Commission v Council (ERTA)*, EU:C:1971:32.

<sup>66</sup> Berteau, n16, 167 and 169.

<sup>67</sup> Decision of the Heads of State or Government, meeting within the European Council, concerning a new settlement for the United Kingdom within the European Union, 2016 OJ C691/1.



well as the level-playing field and the integrity of the internal market'.<sup>68</sup> Thus, whereas Herlin-Karnell and Konstadinides distinguish between a 'value-driven' approach to consistency and 'a "constitutional diktat" based on the methodical application of coercive constitutional principles to justify EU competence and ensure the maximum effectiveness of EU law',<sup>69</sup> perhaps the current phase of Union adaptation means that we have to move towards understanding the latter function as 'value-driven' too; conversely, we would also recognise more the constitutional value of consistency.

The UK's Brexit decision rendered the February 2016 Decision void. But the Commission's March 2017 White Paper on the future of Europe sustains the broader questions that informed those proposals, demonstrating in its sketching of five scenarios for the Union's evolution in the years ahead that more enduring accommodation of difference remains a realistic direction of travel for the remaining 27 EU Member States as they reflect on and steer the next phase of the Union's life.<sup>70</sup> Although making the point to address the post-Lisbon relationship between the CFSP and other Union policies specifically, Cremona captures the nuanced potential of Article 7 more generally in this sense too when she argues that consistency 'does not necessarily imply removal of differences between policies and institutional structures; rather it is about recognising the differences and ensuring that they can live together harmoniously'.<sup>71</sup>

Then, if the accommodation and practice of difference are admitted as more central and sustainable than peripheral and temporary features of European Union integration, the role of consistency in the more complicated frameworks and structures that inevitably result becomes critical. It should still set obligations, but perhaps more nuanced obligations on the basis of altered expectations. Its role would also become more complex; not purely to facilitate the pursuit of integration conceived more straightforwardly through a funnel of uniformity, but instead to manage integration pursued at once in a range of ways, through a range of means, and across a range of levels – an integration perhaps focused more on systemic unity than uniformity, reflecting how European integration actually manifests in practice – the varieties and contours of which have, somewhat ironically, become even clearer through Brexit-influenced analysis<sup>72</sup> – and how it might be sustained beyond one particular vision of its supposed ideal form. This notion of unity borrows from language in other strands of the Court's recent case law.<sup>73</sup> But what might seem like slender linguistic distinctions could acquire substantive legal significance if we are forced to rethink established and entrenched conventions or preferences about integration, which current events and challenges would suggest is indeed the case.<sup>74</sup>

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<sup>68</sup> Ibid 12 (emphasis added).

<sup>69</sup> Herlin-Karnell and Konstadinides, n15, 152.

<sup>70</sup> European Commission, White paper on the future of Europe: reflections and scenarios for the EU27 by 2025', 1 March 2017, available at [https://ec.europa.eu/commission/sites/beta-political/files/white\\_paper\\_on\\_the\\_future\\_of\\_europe\\_en.pdf](https://ec.europa.eu/commission/sites/beta-political/files/white_paper_on_the_future_of_europe_en.pdf).

<sup>71</sup> Cremona, n15, 31.

<sup>72</sup> See generally, Bruno de Witte, 'An undivided Union? Differentiated integration in post-Brexit times' (2018) 55 *Common Market Law Review* (forthcoming).

<sup>73</sup> See in particular, Case C-399/11 *Melloni*, EU:C:2013:107, para. 60 ('It is true that Article 53 of the Charter confirms that, where an EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised').

<sup>74</sup> The Eurozone crisis provides another example of fertile ground for events-driven re-conceptions of EU constitutional premises. See e.g. Claire Kilpatrick 'On the rule of law and economic emergency: the degradation of basic legal values in Europe's bailouts' (2015) 35 *Oxford Journal of Legal Studies* 325;

## V. Conclusion

This chapter examined the legal profile of Article 7 TFEU. The centre of gravity of the provision confers an obligation of consistency; shaped by the history of that principle in EU external relations law, in particular, but now generalised or universalised across the span of Union activity. Article 7 also confers flanking obligations around the balancing of Union objectives and respect for the conferral of powers.

It was shown that consistency does qualify as a general principle of Union law, but that the implications that flow from this are quite limited in terms of legal consequences, especially for any expectations that might be held around intensity of judicial review on the basis of Article 7. It was also seen that notwithstanding developed and imaginative academic thinking on how the principle might be given life, Article 7 has not yet made a conspicuous imprint on Union governance practice.

Is it worth trying to change that? The analysis and limited impact associated with Article 7 to date suggest a provision much more about *message* and *process* than *means* or *outcome*. But even then, many questions remain open. For example, how does Article 7 relate to the more general principles that precede it in the Treaty and to the more specific policy integration clauses that follow on from it? Are the latter clauses intended to be where the real policy shaping work is done? If so, the chapters in this volume examining these provisions suggest a similarly slow route to substantive progress.

Does Article 7 add anything beyond the sum of its three parts? Consistency, taking all objectives into account and a commitment to respect for the conferral of powers were shown not to be straightforwardly harmonious ambitions to bring together. In that light, tensions were evident between the horizontal impetus of the provision and the gaps in practice on the resolution of more vertical questions – about the respective competences of the Union and the Member States, for example; but also concerning the multiplicity of policies, activities and objectives in simultaneous play in many situations. Where consistency obligations have been considered in legal settings post-Lisbon, it would seem that conventional expectations about uniformity, primacy and loyalty – which tend to resolve in favour of Union competence – still manifest more obviously than more novel reflections on either the nature or consequences of the different responsibilities articulated together in Article 7.

However, in trying to think about and develop a more active purpose for the provision into the future, it was argued that we might need to think more creatively – as well as more concretely – about how Article 7 could prove central to the current wave of events-driven work that seeks to reconceive some entrenched premises of EU legal understanding. A dominant purpose of the Lisbon Treaty process concerned the bringing together of disparate and diverse facets of the Union's legal order, seen most obviously in the formal, at least, demolition of its three Maastricht pillars. However, recent challenges such as the Eurozone crisis and Brexit ramifications have perhaps unmasked the enduring complexity of the Union, and of its rules and structures. Into the future, the messages captured in Article 7 TFEU may yet, then, gain more appreciation. Indeed, that may be more necessary than ever.

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Mark Dawson and Floris de Witte 'Constitutional balance in the EU after the euro-crisis' (2013) 76 *Modern Law Review* 817; Edoardo Chiti and PG Texeira 'The constitutional implications of the European responses to the financial and public debt crisis' (2013) 50 *Common Market Law Review* 683.